No. 11794

In the United States Circuit Court of Appeals for the Ninth Circuit

JOSHUA HENDY CORPORATION, A CORPORATION, APPELLANT

v.

LOUISE E. MILLS, ADMINISTRATRIX OF THE ESTATE OF THOMAS C. MILLS, DECEASED, APPELLEE

(and reverse title)

APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., 201 et seq. Because this case presents significant questions of interpretation of that Act, the Administrator, by leave of Court, submits this brief as amicus curiae.

STATEMENT

This is an appeal and cross-appeal from a final judgment of the District Court of the United States for the Southern District of California, Central Division, awarding plaintiffs, after trial, the sum of $645.19 as unpaid overtime wages together with the sum of $75.00 as attorney's fees pursuant to Section 16 (b) of the Fair Labor Standards Act. No liquidated damages were awarded, apparently on the basis of Section 11 of

the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251, 261. This Court has jurisdiction over this appeal under Section 128 of the Judicial Code (28 U. S. C., sec. 225).

STATEMENT OF THE CASE

The appellant corporation was engaged in the production and repair of ships at Wilmington, California, pursuant to contract with the United States Maritime Commission (R. 7, 21, 61). Apparently most of the ships were cargo vessels; some troop transports were also constructed (R. 112, 136). The yard was owned by the Maritime Commission and leased to appellant (R. 110, 106). Title to all materials and equipment used in the construction of the ships was in the Commission (R. 110, 161–162). Upon completion each ship was delivered by appellant to the Commission at the yard and subsequently sent to points outside the State of California (R. 7, 21). The troop transports were turned over to the Navy by the Commission (R. 114).

The contracts between appellant and the Commission were on a cost-plus basis up to March 1, 1945, but commencing with that date they were of the lump-sum type (R. 104, 154). The sample contract in the record (R. 103, 135–177) is a cost-plus contract. It was entered into pursuant to Public Law 247 (77th Congress), approved August 25, 1941, 55 Stat. 669, 681, which authorized the construction of "merchant vessels of such type, size and speed as it [the Commission] may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries" (R. 135). The contract recites the Commission's determination to that effect (R. 135).

Appellant hired its employees with no assistance from the Commission (R. 106), and on only "one or two occasions" did appellant discharge employees at the request of the Commission (R. 100). As an officer of appellant testified: "After all, we were supposed to be running the place" (R. 100). "He [the representative of the Commission] couldn't tell us how to manage it or else there would have been no point in paying us a fee if they are going to tell us how to do it" (R. 108). Under the contract the Commission had access to the premises (R.

158), and all material and workmanship was subject to inspection by the Commission at "proper times" (R. 160). The contract prohibited the making of changes in the general dimensions and characteristics of any of the vessels without the appellant's written consent (R. 139). Upon default by appellant, the Commission was authorized to terminate the contract, enter upon the site, and "take possession" thereof as well as of any vessels and any machinery, materials, equipment, plans and specifications required for the construction of the vessels (R. 170–172).

Appellant admits it employed the deceased in work necessary to the production of the vessels but denies that they were "goods" produced for "commerce" within the meaning of the Fair Labor Standards Act (R. 16). The court below rejected appellant's contentions.[1]

ARGUMENT

The Administrator's position regarding the general question of the applicability of the Act to the production of war materials by cost-plus contractors with the Government is set forth in detail in the brief filed in the Supreme Court by the Solicitor General in *Kennedy* v. *Silas Mason Co.*, October Term, 1947, No. 590, decided May 17, 1948. Acceptance of the arguments advanced in that brief would require affirmance of the decision of the court below that the employee here involved was within the coverage of the Act. We are therefore filing six copies of that brief with the Clerk and respectfully request the Court to treat the copies thus filed as an appendix to this brief.[2]

In the instant case there are additional reasons, beyond those stated in the brief of the United States in the *Silas Mason* case, for holding that the employee was within the scope of the Act. In this brief, without rearguing the propositions advanced in

[1] The district court also held inapplicable a defense raised under Section 2 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. 252). Since the Administrator's interest is confined to the future enforcement of the Fair Labor Standards Act, and since the applicability of Section 2 of the Portal-to-Portal Act is limited to activities performed prior to May 14, 1947, this brief does not deal with the question.

[2] Copies of that brief are being furnished to counsel for the respective parties on this appeal.

the brief in the *Silas Mason* case, we shall set forth the additional considerations which point to coverage here.

The Supreme Court in the *Silas Mason* case declined to pass upon the merits of that case but instead vacated the judgment of the courts below and remanded the case for amplification of the record. We are of the opinion that a similar disposition of this case is not required nor appropriate, since neither of the matters as to which the Supreme Court requested amplification is at issue here. One of these issues was whether the plaintiff and defendant in the *Silas Mason* case stood in the relationship of employee and employer under the Act. The existence of that relationship is conceded here (R. 5–8, 179–180). The other issue was the effect upon the *Silas Mason* case of the Act of July 2, 1940, 54 Stat. 712, pursuant to which the contract in that case was let. Because certain sections of that Act pertained to overtime compensation, it was argued to the Supreme Court that the Act of July 2, 1940, precluded operation of the Fair Labor Standards Act. In the instant case, however, the contract between appellant and the Government recites that it was entered into pursuant to "Public Law 247 (77th Congress) approved August 25, 1941," 55 Stat. 669, 681 (R. 135). This statute relates solely to appropriations for the Maritime Commission and other agencies of the Government, and does not purport in any way to affect overtime compensation. There is therefore no room for argument here that the operation of the Fair Labor Standards Act is precluded by the legislation under which the contract was let. For those reasons, we believe this Court may proceed to decide the issues in this case upon the record here presented.[3]

I

The ships were produced for "commerce" within the meaning of the Fair Labor Standards Act

The district court's holding that the cargo vessels and troop transports in the instant case were produced for "commerce" within the meaning of the Fair Labor Standards Act is plainly correct under this Court's decision in *Ritch* v. *Puget Sound*

[3] It should also be noted that the *Silas Mason* case arose on summary judgment, not, as in the instant case, after a full trial.

Bridge & Dredging Co., 156 F. (2d) 334. In that case this Court held that combat vessels owned and operated by the United States Navy were instrumentalities of commerce, so that employees engaged in construction work in a Navy Yard were engaged "in commerce" within the coverage of the Act. The decision in the *Ritch* case applies *a fortiori* to the instant case which deals with noncombat vessels (cargo ships and troop transports), the production of which was specifically authorized "for carrying on the commerce of the United States" (R. 135). This has been recognized even by the courts which have held that work on combat vessels is not production of goods for commerce. Thus in *Divins* v. *Hazeltine Electronics Corp.,* 163 F. (2d) 100 (C. C. A. 2), the court, although declining to apply the ruling of the *Ritch* decision to combat vessels, held that armed cargo transports and armed transports should be regarded as "engaged in commerce, even though the goods or persons they transport will be devoted to the war effort after arrival at destination" (163 F. (2d) at 102). Similarly in *St. Johns River Shipbuilding Co.* v. *Adams,* 164 F. (2d) 1012, 1014 (decided by the Fifth Circuit Court of Appeals the same day that it decided the *Silas Mason* case), the court, although stating that tankers were not produced for commerce, expressly held that the production of "Liberty ships" for the Maritime Commission, pursuant to the same statutory authority as that authorizing the ship construction in the instant case, was the production of goods for commerce within the meaning of the Act.

Under the holdings of the *Ritch, Divins,* and *Adams* cases, as well as for the reasons stated at pages 23–37 of the brief filed by the United States in the *Silas Mason* case, *supra,* we submit that the court below was correct in holding that the ships were produced for "commerce" within the meaning of the Act.[4]

[4] Appellant's reliance on *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248 (appellant's br., pp. 7–8) is plainly misplaced. In holding that certain articles, including bowling alleys, were "military or naval property of the United States moving for military or naval and not for civil use" so as to be entitled to land-grant rates under Section 321 (a) of the Transportation Act of 1940, a statute which on its face is a regulation of interstate commerce, the Supreme Court obviously did not hold that transportation for "military or naval" use was not transportation in commerce. It held quite the opposite.

II

The ships were "goods" within the meaning of the Fair Labor Standards Act

Section 3 (i) of the Act defines "goods" as meaning all commodities, "including ships," except "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." Appellant argues (appellant's br., pp. 8–9) that this exclusionary clause removes the ships it produced from the category of "goods." The argument, however, appears to rest wholly on the fact that the United States, rather than appellant, at all times owned the materials, parts and supplies which went into the production of the ships. The terms of the contract between appellant and the United States make it clear that only title, and not "actual physical possession," was retained by the United States during the performance of the contract. Thus the contract provides that the Commission and its authorized representatives "shall at all times have access to the premises" (R. 158), and that all materials and workmanship "shall be subject to inspection by inspectors of the Commission at any and all proper times" (R. 160); it further provides that upon default by appellant, the Commission could terminate the contract, "enter upon the site * * * and take possession" of all vessels and all machinery, materials, equipment, plans and specifications required for the construction of the vessels (R. 170–172)—provisions irreconcilable with a contention that the Government retained "actual physical possession" of the materials and goods during the performance of the contract. For these and the other reasons set forth at pages 37–52 of the brief of the United States in the *Silas Mason* case, *supra*, we submit that the ships were "goods" within the meaning of the Act.

Liberty ships produced under circumstances virtually identical to those present here were held by the Fifth Circuit Court of Appeals to constitute "goods." *St. Johns River Shipbuilding Co.* v. *Adams, supra.* Armed cargo ships and troop transports—the very types of ships produced in the instant case—were held by the Second Circuit Court of Appeals to constitute

"goods" while in the hands of contractors engaged in repairing them even though the ships had already been in the actual physical possession of the United States. *Divins* v. *Hazeltine Electronics Corp., supra.* No appellate court has asserted a contrary view.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the court below was correct in holding that deceased was employed by appellant in the production of goods for commerce.

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